United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-6138

In The

United States Court of Appeals

For The Second Circuit

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FRIEDA ROSENBERG,

Plaintiff-Appellant,

P/S

-against-

ELLIOT RICHARDSON, Secretary of Health, Education and Welfare,

Defendant-Appellee.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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FRIEDA ROSENBERG,

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BRIEF IN REPLY

ELLIOT RICHARDSON, Secretary of Health, Education and Welfare,

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Appellant, in reply to the brief submitted by the Appellee, respectfully submits to the Court the fact that the Appellant's position has been and continues to be that the Secretary's decision is in error as a result of the misapplication of the law to the facts.

The Appellee, after spending more than one-half of his brief in again burdening the Court with the facts, commences his law argument, on page 11, by a simple statement and citation that ...

> "In order to establish entitlement to benefits, plaintiff has the burden of proof that the required conditions for eligibility are met"; followed by a statement of the Act that ... "the findings of the Secretary, as to any fact, if supported by substantial evidence, shall be conclusive ..."

It is the Appellant's contention that: she has proved her eligibility and met the required conditions entitling her to benefits, and, the decision of the Secretary is not supported by substantial evidence.

On April 15, 1976, this Court, under Docket No. 75-6047, decided in the case of Maria Eisenhauer, et al v. David Mathews, Secretary of Health, Education and Welfare, to extend the intent of the statute to cover the facts. This Court therein stated:

> "As we have noted, the Social Security Act is to be accorded a liberal application in consonance with its remedial humanitarian aims. 'Adams v. Weinberger, 521 F. 2d 656, 659 (2d Cir. 1975); Gold v. Secretary of Health, Education and Welfare, 463 F. 2d 38, 41 (2d Cir. 1942);' Were we to adopt the restrictive construction of section 216 (e) advocated by the appellant, children who are innocent of any lack of good faith on the part of the parent would be disentitled to benefits regardless of their dependency upon the insured. Such a result runs counter to the principles which govern our interpretation of the Act, not the language of the statute." (Underlining our own)

In this case (Eisenhauer v. Mathews, supra) a demand was made to have "deemed" stepchildren of a purported marriage not in good faith share in the distribution of social security survivor benefits and the Court stretched the principle almost to a bursting point to do equity where justice demanded it.

This Court, in doing what it considered to be just, properly extended the intent of the statute to cover these stepchildren.

It is true that when we refer to children we speak in the plural and when we refer to a spouse, it is in the singular. However, the statute applicable to social security benefits for the welfare of the spouse also recognizes the plural for it provides that both the "legal" spouse and the "deemed" spouse are eligible to receive such benefits.

The basic intent of the statute is to continue the husband's obligation of support

of his dependent spouse in the event of his death.

Though the Act does not particularly provide that the widow benefits shall be divided between the surviving spouses, "legal" and "deemed", there is no negative provision; nor is such division of benefits repugnant to the statute if it would more completely carry out its intent under particular circumstances. Thus, where it would help to support the dependent "deemed" spouse without the expense on the part of the government for the payment of additional benefits and without causing any harm to the statutory preferred legal spouse, intent and equity should prevail.

To disentitle a "deemed spouse" who was innocent of the existence of any impediment "runs counter to the principles which govern the interpretation of the Act" (Eisenhauer, supra).

We should be mindful of Coke's maxim: "verba intentione non e contra debent inservore" (8 Coke 94) "words ought to be made subservient to the intent, not the intent to the words."

The Court's have held that statutes are presumed to have reasonable intent and that the Courts are not always controlled by the literal meaning expressed by the language of the statute. (People v. Pearson, 381 N.Y.S. 2d 401, 404 -- March 8, 1976.) "Whatever is within the spirit, although not within the letter, is within the statute and what is within the letter and not within the spirit is not within the statute." (Standard Accident Insurance Company v. Newman, 2 Misc 2d 348, 349; 47 N.Y.S. 2d 804, 814 affd. 268 App. Div. 967, 51 N.Y.S. 2d 767, App. Div. 1039, 52 N.Y.S. 2d 948.)

The Appellee in the latter part of his brief raises issues concerning the presumption of the validity of the marriage between the Appellant and Max Rosenberg,

deceased.

In the instant case, the validity of the last marriage (Frieda and Max) being supported by one of the strongest presumptions written should not be overturned except by clear and convincing proof or only by proof beyond a reasonable doubt.

In Colosi v. Roger Starr, 381 N.Y.S. 2d 389, 390, the Court recently held (February 20, 1976) "The presumption of the constitutionality is strong and the party asserting the challenge must prove invalidity beyond a reasonable doubt (see Finkel, Nadler and Goldstein v. Levine, 46 A D 2d 868, 358 N.Y.S. 2d 3)".

The holding is that where a "strong presumption" of validity exists it requires proof beyond a reasonable doubt to destroy this "strong presumption".

Such proof has not been satisfactorily established in this case and, therefore, as a matter of law substantiality of evidence does not exist in this case.

A reading of the facts will establish that unless the instant appeal is granted, the Secretary of Health, Education and Welfare without the substantial proof required will be allowed to disenfranchise children and grandchildren of this marriage of more than 30 years.

CONCLUSION

THE ORDER OF THE DISTRICT COURT SHOULD BE MODIFIED AS PRAYED FOR IN THE BRIEF OF THE APPELLANT.

Respectfully submitted,

DONALD J. FLEISHAKER
Attorney for Plaintiff-Appellant

A 202 Affidavit of Personal Service of Papers

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COURT OF APPEALS
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- against -

ELLIOT RICHARDSON,
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Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Reuben A. Shearer *being duly sworn,*
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
211 West 144th Street, New York. New York 10030
That on the 28th *day of* May *19*76 *at* 225 Cadman Plaza, Brooklyn, New York

deponent served the annexed Reply Brief *upon*

David Trager

the *in this action by delivering a*[2] *true copy*[s] *thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein.*

Sworn to before me, this 28th
day of May *19* 76

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

Reuben Shearer
Reuben Shearer